UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALLWAYS EAST TRANSPORTATION, INC.

and **Cases 03-CA-128669**
03-CA-133846

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 445

GENERAL COUNSEL'S REPLY BRIEF

Submitted by,
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I. INTRODUCTION

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits this Reply Brief in the above-captioned cases.

II. ARGUMENT

A. Contrary to the ALJ's Findings Respondent is a Continuous Operation of Durham's Contract with Dutchess County

In her Decision, ALJ Flynn laid out the standard from *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 43 (1987), for determining substantial continuity of operations in a successorship setting. The standards asks if; (1) the business of both employers is essentially the same; (2) the employees of the new company are doing the same jobs in the same working conditions under the same supervisors as the predecessor; and (3) the new entity has the same production process, procedures, and products, and basically the same body of customers. *Id*. (ALJD at 6-7).[1]

Respondent and the ALJ wrongly applied the facts of this case to the *Fall River Dyeing* standard. In doing so both lost sight of the bigger picture and erroneously became fixated upon the minutia regarding certain points and made false comparisons regarding other points. (ALJD at 6-7; R's Brief at 23-24). Notably, the record establishes Respondent's acknowledgement of the students and their importance in any school bus transportation business, especially in the eyes of employees. The continuity of operations analysis is primarily based on the "employees' perspective" and whether "those employees who have been retained will understandably view their job situations as essentially unaltered." *Fall River Dyeing Corp.*, 482 U.S at 43, quoting *Golden State Bottling, Co., Inc. v. NLRB*, 414 U.S. 168, 184 (1973); *Vermont Foundry Co.*, 292

[1] Throughout this brief the following references will be used: (ALJD at __) for the Administrative Law Judge Decision; (R's Brief at __) for Respondent's Answering Brief; (GC Exh. __) for the General Counsel's Exhibits; and (R Exh. __) for Respondent's Exhibits.

NLRB 1003, 1008 (1989) (calling this "the core question"); *Derby Refining Co.*, 292 NLRB 1015 (1989), enfd. 915 F.2d 1448 (10th Cir. 1990).

Contrary to the ALJ's findings and Respondent's Answering Brief, and as explained in General Counsel's Exceptions 10, 18, 20, 30, and 31, Respondent did 'take over' operations from Durham; the contract between Durham and Dutchess County was 'assigned' and/or 'transferred' to Respondent; and Durham and Respondent have 'essentially the same' operations. (R's Brief at 24-25). Respondent took over from Durham and was assigned Durham's former work, because Respondent was tasked with delivering the exact same children, to the exact same schools, at the exact same times, and bringing them back to the exact same houses. That is the work at issue. The question is not, for example, whether Respondent carried out what Durham may have referred to as route D11, D42, or any of its other specific routes, by making a particular number of left and rights turns. This is the minutia that ALJ Flynn and Respondent become lost in. The ALJ misapplied the law to the facts. Respondent provides the same bus transportation services to special education and preschool children in essentially the same manner as Durham. (GC Exh. 3(a), 3(b), 5). Respondent assigns essentially the same drivers and monitors to essentially the same routes and Respondent's employees perform the same jobs that they performed as Durham employees. (Tr. 346, 644, 649). Respondent's employees still service essentially one client – Dutchess County. (GC Exh. 5).

The big picture is that the students are being transported from point A to point B, which is all that the *Fall River Dyeing* standard calls for, i.e. whether the business of both employers is *essentially* the same. Durham ceased operations on Friday afternoon April 11, 2014 and Respondent began operating on Tuesday morning April 22, 2014. During the intervening period the school district was closed for Spring break. (Tr. 229, 434). The students were the same on

Friday April 11 as on the following Tuesday April 22. They lived in the same houses. The schools were the same. They were in the same buildings. They opened and closed at the same times. The distance between the students' homes and their school remained fixed. The traffic conditions were the same. The road conditions were the same. If the children had special needs, those remained the same. Moreover, if any of the above-named factors did change, such change would be external to the successorship situation and would not be factored into the continuity of operations analysis.

In its Answering Brief, Respondent states "[i]n response to **GC's Exception 22**, GC provides no law to support the importance of familiarity with the children." (R's Brief at 34). Familiarity with the children is a factual, not a legal matter. Asking for caselaw on this issue is akin to asking for caselaw proving that Poughkeepsie is a city in New York. Rather, familiarity with the children goes to the core of continuity of operations from the perspective of the drivers and monitors, and even supervisors. Marlaina Koller testified that, "[t]he children that we work with, they don't deal well with change. And if you can keep, you know, a steady driver or monitor, or both, the children are better behaved for their time that they're on the vehicle." (Tr. 643-644). Familiarity with the children made the work of the drivers and monitors easier and consistent during the transition from Durham to Respondent. Respondent also benefited from this familiarity because it likely minimized what might otherwise have resulted in complaints from children, parents, or teachers due to misunderstandings between drivers and monitors and the children. Marlaina Koller even testified that this was suggested by Dutchess County. (Tr. 643-644).

Respondent's Answering Brief erroneously focuses on factors that are only a minor part of the workday for drivers and monitors, such as the Zonar operating system, the corporate

procedures and rules of conduct, its numbering system for the buses, the nomenclature regarding the routes, 19A school bus licenses, and DOT certifications. (R's Brief at 33-34, 39). There is no evidence however, that drivers and monitors were effected by any of these issues when going about their normal workday. The evidence establishes that in the eyes of the employees, which is the relevant successorship test, the core terms and conditions of their employment remained the same. (GC Exh. 3(a), 3(b), 5; Tr. 338-339, 346, 353, 356, 431, 433, 528, 540, 542, 643-644, 649). Much more likely is that the drivers and monitors are concerned with keeping the children in their seats and arriving at the school on time.

Respondent also makes several false comparisons on the continuity of operations issue. The appropriate comparison under the *Fall River Dyeing* standard for "the same jobs in the same working conditions under the same supervisors"[2] and "the same production process, procedures, and products, and basically the same body of customers," is between Durham's operations in Dutchess County for these same schools and Respondent's operations. Respondent incorrectly attempts to compare all of Durham's nationwide operations and central headquarters in Chicago against the comparatively small operations concerning the bargaining-unit work assumed by Respondent. (R's Brief at 30, 34). The proper comparison is only against the bargaining-unit represented by the Union. (GC Exh. 3(a), 7).

In attacking the appropriateness of the unit, Respondent makes another false comparison regarding the bargaining history of the unit and the time to be weighed towards that history. Respondent claims, without support, that the only time to be weighed is when there was actually a collective-bargaining agreement in effect between Durham and the Union. However, any period of time when the unit had an exclusive certified bargaining representative should weigh

[2] Admittedly, the same supervisors are not present, but this factor is not dispositive as addressed in the General Counsel's previous brief in support of exceptions.

towards that history. *See Radio Station KOMO-AM*, 324 NLRB 256, 262 (1997) ("the most compelling factor…is the history of collective bargaining for the unit"). Here, the bargaining history is a strong indicator of the appropriateness of the Dutchess County unit. The Union had been certified for several years and had negotiated at least two contracts prior to Respondent's takeover—one of which was in effect at the time of the transition. (GC Exh. 7; Tr. 276-277).

B. Contrary to the ALJ's Findings Respondent's Wappingers Falls Location is an Appropriate Stand Alone Bargaining Unit

On the issue of the appropriateness of the bargaining-unit, the General Counsel will address the matter of interchange here and refer the Board to its previous brief for other arguments.

Board law distinguishes between interchange which occurs only during a startup or busy period and interchange that occurs as part of normally scheduled operations. Similarly, evidence of limited interchange during a startup or busy period is insufficient to disturb the single facility presumption. *See Heritage Park Health Care Center*, 324 NLRB 447, 451-52 (1997), *enforced* 159 F.3d 1346 (2d Cir. 1998) (unpublished table decision) (temporary transfers during 6-month transition period due to shortage of employees was insufficient to establish significant interchange). *See also Macy's, Inc.*, 361 NLRB No. 4, slip op. at 10 (2014) (temporary instances of assistance to other departments with inventory procedures not considered significant interchange in appropriate unit determination). The record evidence here weighs in favor of finding that the limited one-way interchange that did occur is attributable to start-up operations.

Respondent asserts in its Answering Brief that:

> In the months of April and May 2014, the Respondent also shuttled on a daily basis approximately 8 to 15 Yonkers drivers and monitors back and forth from the Yonkers to the Wappingers Falls yard to both cover Dutchess County routes due to absenteeism and service regularly scheduled routes due to a shortage of drivers and monitors. R-32: Tr. 301, 746-749, 834, 842, 883-84, 888-890 and 896.

(R's Brief at 10).

However, that evidence only pertains to start up interchange, which is not dispositive of the successorship issue. None of the documentary or testimonial evidence cited by Respondent supports the proposition that Respondent intended to continue interchanging drivers from its Yonkers' yard to its Wappingers Fall's yard on a long term basis. Respondent's Exhibit 32 consists of the Department of Transportation reports or mileage cards for its various drivers, but no part of this document offers any insight into *why* drivers did particular routes or if it was part of long term plan. (R Exh. 32). The above-noted transcript citations by Respondent likewise do not offer support that Respondent intended to continue interchanging drivers indefinitely. Instead, Marlaina Koller's own testimony was that, "[w]e had a number of Employees staying at the local hotel for a short period of time to get started." (Tr. 834). The testimony of Respondent's Fleet Manager, Frank Ortiz, also suggests that it was a temporary arrangement and the interchanged drivers were referred to as "Cover Drivers." (Tr. 896). The sworn affidavits of Carlos Rivera and Aldo Leon make a distinction between interchanging about ten drivers daily during startup operations and interchanging fewer drivers and with less frequency once operations were fully up and running. Rivera stated, "[w]hile there may not have been any drivers shuttled from Yonkers to Wappingers Falls in the last 3 weeks since school started […] I would estimate that in the summer, between 5-10 drivers were shuttled up here form [sic] Yonkers every day." (GC Exh. 11; Tr. 493). Leon stated, "[a]fter the initial period we still used drivers from Yonkers as needed – not every day but many days to cover runs. We have not used any in the past two weeks." (GC Exh. 10; Tr. 305-306). Thus, Respondent's implication that interchanging drivers from Yonkers to Wappingers Falls was part of a permanent policy to provide coverage whenever there was absenteeism should be rejected.

Also relating to interchange, Respondent asserts in its Answering Brief that, "[o]ther Respondent's Yonkers yard employees elected to reside in a hotel during the week while working in Wappinger Falls performing Dutchess County Work Id.; R-24." (R's Brief at 10). In support of this claim Respondent cites only to Respondent's Exhibit 24, which is 12-pages of bills from the Days Hotel in Fishkill, New York for certain dates from April 24 to June 13, 2014. (R's Brief at 10; R Exh. 24). Respondent does not cite to any transcript pages. There is no evidence in the record and no way to determine from the hotel bills alone who stayed in the hotel on those dates. No names of the individuals who allegedly stayed in the hotel were ever identified and none were called as a witness by Respondent even though it presumably could have done so. Respondent implies that the hotel guests were drivers and/or monitors from its Yonkers facility, but the record does not confirm this. The record does not confirm if the hotel guests were in fact supervisors or the owners of Respondent. Although the hotel guests were referred to as driving routes for Respondent in Dutchess, Respondent has stated that its dispatchers and even President Judy Koller sometimes drive, so this does not rule out the possibility that the hotel guests were supervisors. (Tr. 286, 474, 680). Additionally, there is certainly no evidence in the record that certain employees *elected* to stay in a hotel, rather than being *assigned* to stay there by Respondent. (R's Brief at 10). There is an overall vagueness in the record concerning the entire hotel arrangement and it is insufficient for Respondent to establish meaningful interchange. Respondent attempts to portray Respondent's Exhibit 24 in such a way as to inflate the number of employees involved in interchange to a greater number than can actually be confirmed by the record. When it comes to determining the number of employees interchanged from the Yonkers yard to the Wappingers Falls yard, the General Counsel argues that the Board should make an adverse inference against Respondent and find

that a lower number of employees interchanged where the record in ambiguous. Respondent was in the best position to produce documentary or testimonial evidence as to *exactly* who stayed in the hotel and their job titles, but failed to do so. Furthermore, the hotel bills alone, Respondent Exhibit 24, are of limited or no probative value without accompanying evidence as to the identities of the guests. The true number of interchanged drivers is only about eight to ten. (Tr. 834). Respondent failed to sustain its burden to show that there has been meaningful interchange between the employees of the two distant facilities.

C. Respondent's Answering Brief Makes Several Improper Assertions

First, Respondent makes assertions regarding Durham's route sheets (R Exh. 14) that are not supported by the record evidence. (R's Brief at 31-32). On December 1, 2014, Respondent served a subpoena on Durham and requested:

> 17. Copies of all documents regarding route assignments, including route sheets for all drivers and monitors (matrons) employed at Durham's Poughkeepsie facility from January 1, 2014 to June 1, 2014.
> 18. Copies of all documents regarding route assignments, including route sheets for all drivers and monitors (matrons) employed at Durham's Rhinebeck/Red Hook facility from January 1, 2014 to June 1, 2014.

(R. Exh. 1 at 11).

At hearing on March 30, 2015, Durham produced documents in response to Respondent's subpoena and Respondent's Exhibit 14 is a portion of that production. (Tr. 109-110, 773). Respondent entered Exhibit 14 into evidence on April 22, 2015 through its witness Mark Nusbaum, General Manager of Durham's Poughkeepsie facility. (Tr. 770-773).

Respondent's Exhibit 14 consists of maps and accompanying directions, or 'left-right,' sheets for 52 routes operated by Durham. In its Answering Brief, Respondent claims that Exhibit 14, combined with its subpoena on Durham (R Exh. 1 at 11), and the testimony of Nusbaum (Tr. 775-776), establishes that the routes on the sheets were operated in the exact manner that they

appear in Exhibit 14 for the period January 1, 2014 through June 1, 2014. (R's Brief at 32). Respondent then uses Respondent's Exhibit 14, derived from Durham's production, and Respondent's Exhibit 42, derived from its own records, to create a side-by-side chart of Durham's routes and Respondent's routes. (R's Brief at 17-19). Respondent takes far too many liberties in presenting this claim. The General Counsel questioned Nusbaum in relation to Respondent's Exhibit 14 and he testified that he did not know when the documents were created, only that it was before he was hired. (Tr. 773-774).

Therefore, the route sheets from Durham, Respondent's Exhibit 14, are undated and they could be from the 2013-2014 school year or they could not be. Thus, Respondent's chart merely compares its own routes against Durham's routes from an unknown point in time. Such a comparison is of no value in assessing the continuity or discontinuity of operations between Durham and Respondent. Respondent's statement that, "[a]ccordingly, these documents [R Exh. 14] were admitted in the Record and into evidence as the Durham route sheets in operation from January 1, 2014 through June 1, 2014," is false. (R's Brief at 32). The General Counsel never entered any stipulation that Respondent's Exhibit 14 represents routes in effect from January 1, 2014 to June 1, 2014 as implied by Respondent. Likewise, the General Counsel never stipulated that Respondent's Exhibit 14 is responsive to paragraphs 17 and 18 of Respondent's subpoena request. (R Exh. 1 at 11). Determining if Respondent's subpoena has been satisfied is not the General Counsel's obligation. Regardless, the General Counsel argues that Respondent's Exhibit 14 has little weight, whether the documents were produced under subpoena or not, as the route sheets go to a level of minutia not called for under the *Fall River Dyeing* standard.[3]

[3] Also on this point, Respondent's statement that "GC has waived his right to put forth this argument on appeal before the Board since GC withdrew his objections to these documents following the above testimony! Tr. 776," is false. (R's Brief at 32). The General Counsel withdrew its objection only to the authenticity of the documents, not their weight, which it argues here is little or none. (Tr. 773-776).

While, Nusbaum testified that the Durham route sheets embodied in Respondent's Exhibit 14 are kept in the normal course of business (Tr. 775-776), there was no testimony that the route sheets were current as of the time of successorship, that they are annually updated, or if they are ever updated. It is equally plausible that the route sheets remain in storage for years without revision and that the drivers and dispatchers nevertheless make ad hoc adjustments to their routes as needed. The chart is not reliable in assessing continuity of operations between Durham and Respondent. (R's Brief at 17-19). Again, however, as noted above, the point is that Respondent uses essentially the same routes as Durham and assigns essentially the same drivers and monitors to those routes. (Tr. 346, 644, 649).

Second, in its Answering Brief, Respondent improperly relies upon an order of United States District Court Judge Nelson S. Roman for the Southern District of New York from the General Counsel's Petition for a 10(j) Injunction. (R's Brief at 42). The Board should disregard this reference because U.S. District Court orders are without precedential value before the Board.

III. CONCLUSION

General Counsel respectfully requests that the ALJ's findings of fact, analysis, and conclusion should be reversed and modified as reflected by General Counsel's Exceptions, and that the recommended remedy and order be modified to include all the remedies sought by the General Counsel in the Consolidated Complaint, and any other remedies as deemed appropriate by the Board.

DATED at Albany, New York this 25th day of February, 2016.

Respectfully Submitted,

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